centage of the gross receipts. The question is probably settled in Minnesota so far as railroads are concerned. But the question still remains open for other corporations, enjoying privileges under the gross receipts tax system, whether the present or any future Legislature can raise the rate per cent. of their annual tax, or substitute for it an *ad valorem* tax. On this point the opinion of Mr. Justice WHITE (speaking for HARLAN, GRAY and MCKENNA, J. J.), is important. He says: "The moment it is admitted that a gross receipt tax is an irrevocable contract, thereby it necessarily results that an exemption is provided for. The object of forbidding exemptions from taxation is not alone to secure revenue, but is to preserve untrammeled by contract the fulness of all the lawful power of taxation in the successive repositories of such power."

This reasoning seems sound. It is one thing to say that a gross-receipts tax for a given year is not an exemption; and quite another thing to say that a contract whereby future legislatures are kept from exercising their discretion, as to equalizing the general burden of taxation and readjusting the scheme of taxes when burdens become misplaced, does not render possible the development of a great system of exemptions. Such a contract would take away from the courts the right in any one year to consider whether the Legislature had abused its discretion in choosing the method of securing equalization and preventing exemptions, and only through the courts can clauses in a constitution providing for "equal and uniform taxes" "without exemptions" be enforced. Such a contract should, therefore, be declared void from its inception under a clause against exemptions.

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REGULATION OF COMMERCE, THE POLICE POWER, AND THE ORIGINAL PACKAGE RULE.—By its decision in the case of *Austin* v. *Tennessee*, 21 Sup. Ct. Rep., 132 (November 19, 1900), the United States Supreme Court has come very near to overruling certain of its decisions vitally affecting the interpretation of our Federal Constitution. The Court here held that a State could prohibit the sale of cigarettes, and then punish a man who imported them in packages of ten and sold these packages singly. The packages were taken by an express company from a loose pile in a factory outside the State, were transported in an open basket belonging to the company, and delivered to the importer at his place of business, being first taken out of the basket by the express company's agent. Obviously, this was a subterfuge to evade the State statute. But was not the importer protected under the interstate commerce clause of the Constitution? Four Judges of the Court, speaking through Mr. Justice BROWN, denied that he was. They conceded that cigarettes were a legitimate article of commerce, and that the real question in the case was the definition of the term "original package" under the rule which protects the sale of original packages by the importer. Was it the package in which the importation was actually made, or a package of the size of those "in which *bona fide* transactions are

carried on between the manufacturer and the wholesale dealers residing in different States"? Mr. Justice BROWN adopted the latter view; the essential term of which is *bona fide, i. e.*, good faith in regard to State statutes prohibiting the sale of certain articles to consumers. According to this definition, therefore, in the absence of legislation by Congress, no package can be an "original package" which is small enough to be purchased by a consumer in attempted evasion of the State statute. So that, in effect, Mr. Justice BROWN imposed the following limitation on the "original package" rule: In the absence of express affirmative legislation by Congress, whenever the sale of an original package by the importer becomes a sale to the consumer, freedom of interstate traffic gives way to police regulations of the State, even though the article sold be recognized as a legitimate subject of commerce. The dissenting opinion of Mr. Justice BREWER (FULLER, C. J., SHIRAS and PECKHAM, J. J., with him) insisted, that, since Congress has the exclusive regulation of commerce, it could, if it chose, prescribe a large form of cigarette package for the interstate trade; but if it remained passive it left the matter to the determination of the importer. The basis of this latter contention was the doctrine summed up by BRADLEY, J., in *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S., 489, 493 (1887), "Where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions." Apparently, according to Justices BROWN, HARLAN, GRAY and MCKENNA, the power of Congress to regulate interstate commerce is not exclusive, but until Congress has specifically defined what shall constitute an "original package" entitled to protection under the constitution, the State has a right to define the term, by virtue of its police power, and say what size of package importers must adopt. Yet, by the cases of *Leisy* v. *Hardin*, 135 U. S., 100 (1889), and *Schollenberger* v. *Pennsylvania*, 171 U. S., 1 (1899), the point seemed clearly settled the other way.

How, then, stands the law? In *Austin* v. *Tennessee*, the Judges were divided four to four. Mr. Justice WHITE cast the deciding vote. He held as against all his colleagues, on the mere question of fact, that the package here actually imported was the basket, not the package of ten cigarettes. The vital questions raised by the other eight judges are not discussed by him. This case, therefore, leaves the law in a most unsettled and unsatisfactory condition.